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In the Supreme Court of the United States

OCTOBER TERM, 196..

No. 206...

THE BOWATER STEAMSHIP COMPANY, LTD.,

Petitioner,

against

EARL PATTERSON,
individually and as Secretary of
INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO; JOHN DOE, RICHARD ROE & JOHN ROE,
being fictitious, the real names of the defendants being unknown to the plaintiff, said fictitious names being intended to designate the pickets of the plaintiff's Motor Vessel GLADYS BOWATER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals,
For the Second Circuit.

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being fictitious, the real names of the defendants being unknown to the plaintiff, said fictitious names being intended to designate the pickets of the plaintiff's Motor Vessel GLADYS BOWATER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals, For the Second Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, for the Second Circuit, entered in the above matter on March 28, 1962.

OPINIONS OF THE COURTS BELOW.

The Findings of Fact and Conclusions of Law filed November 5, 1959, by the Honorable Harold P. Burke of the United States District Court, Western District of New York, entitling petitioner to a preliminary injunction is unreported and is set out in the Record (Appendix to Brief of Appellant) at page 17.

The decision and order of the Honorable Harold P. Burke, dated September 16, 1960, overruling his previous decision and vacating the temporary restraining order is unreported and is set out at p. 25 of the Record.

The majority and dissenting opinions of the United States Court of Appeals, for the Second Circuit, dated March 28, 1962, is unreported to date and is set forth in the Appendix hereto at pages 26-44.

JURISDICTION.

This action originally brought in the United States District Court relied for jurisdiction on 28 U. S. C. § 1331 as a case arising "under the constitution, laws or treaties of the United States." At the hearing before the Court of Appeals the petitioner moved pursuant to 28 U. S. C. § 1653 to amend their complaint so as to also state a claim under 28 U. S. C. § 1350, which statute gives the District Court "original jurisdiction of any civil action by an alien for tort only committed in violation of the law of nations or a treaty of the United States," which amendment was granted.

The judgment of the United States Court of Appeals for the Second Circuit was dated and entered on March 28, 1962 (page 45, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. The basic question is whether or not a United States District Court exercising jurisdiction under 28 U. S. C., Section 1331 or 1350 may enjoin the picketing of a British vessel temporarily in an American port, where the labor dispute, if any, due to prior legislative edict of a foreign government, took place in a foreign country entirely between foreign employers and employees.

The following subsidiary questions are presented for determination of the basic question:

(a) whether the Courts below erred in their interpretation of the decision of this Court in *Marine Cooks & Stewards, AFL et al., vs. Panama Steamship Co., Ltd.*, 362 U. S. 365 to the facts of this case;

(b) whether the Court of Appeals erred in "piercing the corporate veil" in order to apply the provisions of the Norris-LaGuardia Act under the circumstances of this case, which would appear to be in substantial conflict with the Court of Appeals' earlier decision in *Empresa Hondurena Vapores S. A. vs. McLeod*, 300 F. (2d) 222 (2 Cir. 1962);

(c) whether the Courts below erred in failing to apply the rule enunciated in *Khedivial Line S. A. E. vs. Seafarers' International Union*, 278 F. (2d) 49 (2 Cir. 1960) where the petitioner was not the cause of the picketers' grievance due to legislative intervention by a foreign government.

2. Whether the Court of Appeals erred in failing to hold that the picketing under the circumstances of this case constituted a violation of the treaty between the United States and the United Kingdom entitled "To Regulate the Commerce Between the Territories of the United

States and of His Britannic Majesty" signed and ratified in 1815, 8 U. S. Stat. 228 and extended indefinitely on August 6, 1827, 8 U. S. Stat. 361; and whether the picketing unlawfully interfered with the foreign commerce of the United States or was in violation of the law of nations.

STATUTES AND TREATIES INVOLVED.

The statutory provisions involved are the Norris-LaGuardia Act, 29 U. S. C., Sections 101-115; and the 1959 Trade Union (Emergency Provisions) Act No. 2 passed on March 6, 1959 by the Legislature of Newfoundland.

Sections 101, 102, 113 of the Norris-LaGuardia Act are reprinted in the Appendix, *infra*, pages 45 to 47. The 1959 Trade Union Act is reprinted in its entirety in the Appendix, *infra*, pages 48 to 49.

Reprinted in Appendix, *infra*, at p. 50 is Article I of the treaty dated 1815 between the United States and the United Kingdom entitled "To Regulate the Commerce Between the Territories of the United States and of His Britannic Majesty," 8 U. S. Stat. 228.

STATEMENT OF THE CASE.

A. The Parties to the Litigation.

The Bowater Steamship Company, Ltd., petitioner, is a corporation organized and existing under the laws of England, with its office and place and business at Knightsbridge S. W. 1, London, England (R. 12, 38). Said Company owns and operates a fleet of vessels under English registry, including the M/V Gladys Bowater, engaged in commerce and navigation between various ports in the world, some portion of this trade being between foreign ports and ports located in the United States (R. 12, 27).

The Master, officers and crew of the M/V Gladys Bowater are British Nationals, employed by the petitioner under shipping articles conforming to British law and executed in England. During August, 1959, when the dispute in question arose, all officers and crew members employed aboard said vessel were members of various English labor organizations (R. 12, 19).

The respondent, International Woodworkers of America, AFL-CIO, is an international labor organization with officers and members in the United States and Canada.

B. Other Parties Involved.

The Bowater Paper Company, Ltd., the parent corporation, is a British corporation with offices in London. It owns the Bowater Steamship Company, Ltd. It also owns the Bowater Corporation of North America, a Canadian corporation (R. 18, 32).

The Bowater Corporation of North America is the owner of Bowater's Newfoundland Pulp and Paper Mills Limited, a Canadian corporation, which company is engaged in the operation of pulp and paper mills in the Province of Newfoundland, Canada, where it has timberlands and licenses to timber rights on lands owned by others (R. 18, 33, 36).

Bowater's Newfoundland Pulp and Paper Mills Limited sells its paper to its subsidiary Newfoundland Export Company, Ltd., which in turn sells the paper to Bowater Paper Company of New York, the distributor of paper products in the United States (R. 18, 33).

The Export Company is a Canadian corporation and the Bowater Paper Company of New York, a New York corporation (R. 18, 34, 35).

The Anglo Newfoundland Development Company is also engaged in the operation of pulp and paper mills in the

Province of Newfoundland, and in no way connected or allied with the Bowater interests. It is a competitor of Bowater's Newfoundland Pulp and Paper Mills Ltd. (R. 19, 20, 39, 40). Like Bowater's Newfoundland, Anglo also owns or controls substantial amounts of timberland in Newfoundland (R. 29).

C. The Controversy in Newfoundland.

The conflict commenced in Newfoundland during 1956 (R. 64, 65) when one Alexander Ladd, a resident of Toronto, Ontario (R. 64), and organizer of the Canadian branch of the respondent, International Woodworkers of America (hereinafter called "I. W. A."), addressed a convention of an independent Union of woodworkers in Newfoundland.

In 1956, and prior thereto, men working in the woods in Newfoundland, such as tree cutters and affiliated jobs (hereinafter referred to as woodsmen), which furnished pulpwood for the paper industry, belonged to four independent unions and, each year, representatives of the two major paper companies on the island, the Anglo-Newfoundland Development Company, Ltd. (hereinafter referred to as "Anglo") and the Bowater's Newfoundland Pulp and Paper Mills Limited (hereinafter referred to as "Bowater's Newfoundland") met with the four unions to discuss new contracts. These meetings were held under the chairmanship of a man who was mutually agreed upon to regulate discussions, and a permanent secretary was employed who acted as a liaison between all concerned. This group was known as the Woods Labor Board and, following negotiations, and an agreement reached, a collective agreement was signed. At that time, woodsmen who cut timber for Bowater's Newfoundland were employed by a number of independent contractors and, under the 1956 agree-

ment, grievances were handled between the worker and the contractor and, if unresolved, then between the Union and the woods' management of Bowater's Newfoundland (R. 21, 46, 47).

In November of 1956 the I. W. A. commenced an organizing campaign with respect to the woodsmen employed by Anglo (R. 65).

At this point it should be noted that Anglo and Bowater's Newfoundland employed different methods in getting the wood cut. The Anglo company employed directly their own woodsmen and operated their own camps (R. 45). Bowater contracted the wood cutting with independent contractors who hired their own men (R. 20, 21, 45, 46).

During the early months of 1957 the I. W. A. made application to the Newfoundland Labor Relations Board to represent employees of Anglo (R. 65). On March 11, 1957 the I. W. A. first made application to the Board to be certified for a unit of workers, comprised of woodsmen employed by independent contractors working in Bowater's Newfoundland Deer Lake operation (R. 40, 41).

These applications were denied (R. 41), on the ground that it was an international Union over which the Board ruled it did not have jurisdiction (R. 66).

Following the dismissal of the applications in the spring of 1957, the Union proceeded to set up its "local" unions 2-254, which was to cover operations of Anglo, and 2-255, which was to deal with the Newfoundland Deer Lake region on which independent contractors of Bowater worked (R. 66, 67).

After the establishment of the "local" unions, the I. W. A. made a second application to the Board (R. 66) on behalf of Anglo workers (R. 68). Following this application, the local 2-254 was certified for employees of Anglo

(R. 68); a secret election held conducted by the government, which was won by the I. W. A. (R. 68). Negotiations for a labor contract with Anglo were commenced in June of 1958 and carried on intermittently through October, 1958. These meetings were unproductive, whereupon the I. W. A. applied to the government for conciliation service (R. 68, 69).

Following extensive hearings, the Conciliation Board handed down an award in December, 1958, relating to wages and working conditions which the Anglo Company refused to accept (R. 69). Accordingly on December 31, 1958, the I. W. A. called a strike against Anglo (R. 70, 71).

As above set forth, the I. W. A.'s first application with respect to the Deer Lake region of Bowater's Newfoundland operation was denied by the Board for lack of status during the early months of 1957 (R. 41). The I. W. A. then began a second organizational campaign, following which they again made application to the Newfoundland Labor Board (R. 70, 71). This application was dismissed by the Board on the grounds that the persons working in the woods, whom the I. W. A. was attempting to organize, were not Bowater's Newfoundland employees but, instead, were employees of sub or independent contractors (R. 70, 71). The I. W. A. then set about to again sign up the woodsmen in the name of the individual contractors and, ultimately, organized employees of some 40 or 41 of the contractors. As a result the Newfoundland Labor Relations Board certified the I. W. A. as a bargaining agent for some 13 or more of these contractors and collective bargaining was actually begun with one such contractor by the name of House (R. 71).

It was while the collective bargaining was in process with the various contractors, that the strike against Anglo

was called by the I. W. A. on December 31, 1958 (R. 70, 71). This strike called against Anglo was, according to witness Ladd, "very complete" (R. 72 and 73).

During the early part of January, 1959, Bowater's Newfoundland announced publicly that they were going to supply wood to Anglo in order to keep their mills in operation (R. 72, 73). On January 20, 1959, employees of some of the independent contractors working on Bowater's Newfoundland land commenced a work stoppage in sympathy with the strike called against Anglo, although many of the woodsmen continued to work (R. 57, 58, 73).

Prior to this time, it was customary for Bowater's Newfoundland and Anglo to exchange pulpwood but probably not in the same amount they did after the strike commenced (R. 20, 62, 63).

Following the calling of the strike against Anglo, violence erupted in Newfoundland resulting in woodsmen being assaulted and driven out of their camps by the I. W. A. only partially clad and in subzero weather, and driven to a point some 30 miles from the nearest shelter (R. 19, 20, 82). In addition, a policeman was killed as a result of the aforementioned violence (R. 81).

Because of the violence which had taken place, Mr. Smallwood, the Premier of Newfoundland, who had himself at one time been a labor organizer (R. 87), made a television broadcast to the Province on February 12, 1959 (R. 86), at which time he denounced the violence in the strongest terms, i. e., "I. W. A.'ism in Newfoundland means bloody violence, lawlessness and hate." (R. 81, 86, 87), and urged the woodsmen to leave the I. W. A. He also stated that the I. W. A. would never get a contract in Newfoundland (R. 86).

On March 6, 1959, the legislature of Newfoundland unanimously (R. 83) passed "AN ACT TO MAKE PRO-

VISION FOR SAFEGUARDING THE PUBLIC INTEREST IN VIEW OF THE PRESENT UNSETTLED CONDITIONS IN THE WOODS LABOR PART OF THE PULP AND PAPER INDUSTRY IN THE PROVINCE", which Act revoked the certification in Newfoundland of the I. W. A.'s locals No. 2-254 and 2-255 (R. 51, 52, 75: Appendix, pp. 48-49, *infra*), and voided any contracts which the Union had on the island.

Following Premier Smallwood's speech to the Province, a new union was formed for the woodsmen with one Max Lane as its leader (R. 74, 75) called the Newfoundland Brotherhood of Woodworkers. There is at the present time a contractors' association whose employees work on land owned or licensed by Bowater's Newfoundland, who now deal directly with the new logger's union (R. 58).

D. The Controversy at Buffalo, New York.

On July 25, 1959, the M/V Gladys Bowater completed loading a cargo of newsprint at Corner Brook, Newfoundland, for transportation and delivery to Buffalo, New York, for the account of the Buffalo Evening News and Buffalo Courier Express (R. 12, 13).

The vessel arrived at the Templeton Terminal Dock at Buffalo, New York at 1:39 A. M. on August 3, 1959. The unloading of her cargo of newsprint was scheduled to commence at 8:00 A. M. on August 3, 1959, and the said vessel was in all respects prepared to unload cargo at that time. The actual unloading of the cargo was to be performed by longshoremen employed by the Pittston Stevedoring Company, a domestic corporation. Longshoremen employed by Pittston at Buffalo are members of the International Brotherhood of Longshoremen, Local 928, a labor

organization which regularly represents such employees in the Port of Buffalo (R. 13).

Prior to the commencement of unloading operations at the Templeton Terminal Dock, a lone picket appeared on the dock in the vicinity of the M/V Gladys Bowater on the morning of August 3, 1959, carrying a sign reading:

> "GLADYS BOWATER UNFAIR TO ORGANIZED LABOR—AFL-CIO—INTERNATIONAL WOODWORKERS OF AMERICA."

When longshoremen employees reported for work that morning at the Templeton Terminal, they refused to unload the cargo of the M/V Gladys Bowater because of the picketing hereinbefore described and engaged in a concerted refusal to unload the cargo of the vessel while the picketing continued (R. 13).

The picketing continued without interruption until the afternoon of August 6, 1959 when the picket was served with a copy of the restraining order granted by the United States District Court for the Western District of New York, whereupon the picket departed from the Templeton Dock. Thereafter longshoremen unloaded the cargo and the vessel departed Buffalo on August 8, 1959 (R. 14).

At the hearing, before the District Court on Aug. 3, 1959, the reasons for picketing the M/V Gladys Bowater were succinctly set forth by I. W. A.'s witness Ladd in the following language (R. 76):

> "Q. About this vessel, the Gladys Bowater, do the International Woodworkers of America claim to represent any of the licensed or unlicensed seamen aboard that vessel?
>
> A. The seamen?
>
> Q. Yes.
>
> A. No.

Q. Are you seeking to?

A. No.

Q. What is the purpose of your picket line?

A. Well, our main purpose is informational—I don't know if that is the proper word or not, but an informational picket line so we can tell the whole world, and we don't care who knows anywhere in the United States or anywhere else that we consider the Bowater Corporation and the A. N. D. Company unfair to the loggers of Newfoundland, to organized labor.

The Court: You say that is only for information?

The Witness: Well, that was our basic purpose, sir.

The Court: Would you think it would be all right for the Union men to cross that picket line?

The Witness: Well, I was hoping they wouldn't. Frankly, I hoped they wouldn't, but we had no way of making them.

The Court: You didn't think they would cross it, did you?

The Witness: I was hopeful. As far as I am concerned, I was hopeful wherever we established picket lines they wouldn't violate them.

Q. There is no secret about that, you were hoping that they wouldn't?

A. Surely."

The District Court concluded there was no labor dispute between the petitioner and the respondent within the meaning of the Norris-LaGuardia Act and on November 4, 1959 issued a temporary restraining order. On September 16, 1960, following the decision of this Court in the case of *Marine Cooks & Stewards vs. Panama Steamship Company, Ltd.*, 362 U. S. 365, the District Court reversed its original decision vacating the temporary restraining order. The United States Court of Appeals, for the Second Circuit, affirmed on March 28, 1962.

REASONS FOR GRANTING THE WRIT.

Stated summarily the reasons for granting the writ are as follows:

1. This case involves an important question, not heretofore decided by this Court with respect to the applicability of the Norris-LaGuardia Act as it relates to picketing of foreign shipping in the United States when the alleged "dispute" and disputants are foreign and a foreign government had taken legislative action.

2. The decision of the United States Court of Appeals misinterprets and misapplies the decision of this Court in *Marine Cooks & Stewards, AFL et al. v. Panama Steamship Company, Ltd., et al.*, 362 U. S. 365 (1960).

3. The decision conflicts with previous decisions rendered by the United States Court of Appeals, Second Circuit, namely, *Khedivial Line S. A. E. v. Seafarers' International Union*, 278 F. (2d) 49 (1960) and *Empresa Hondurena Vapores S. A. v. McLeod*, 300 F. (2d) 222 (1962).

4. The decision of the United States Court of Appeals violates Article I of the treaty "To Regulate the Commerce Between the Territories of the United States and of His Britannic Majesty" of 1815 with the United Kingdom, and interferes with the foreign commerce of the United States.

5. The questions presented are of great general interest to foreign shipowners, exporters, importers, stevedores and many other businesses involved in foreign trade.

A discussion of the reasons for granting the writ follows.

1. This Case Involves an Important Question, Not Heretofore Decided by this Court with Respect to the Applicability of the Norris-LaGuardia Act as it Relates to Picketing of Foreign Shipping in the United States when the Alleged "Dispute" and Disputants are Foreign and a Foreign Government Had Taken Legislative Action.

Petitioner submits that as a matter of law under the factual situation presented the Court of Appeals erred in concluding that the District Court was deprived of jurisdiction by virtue of the provisions of the Norris-LaGuardia Act to issue the requested injunction.

There is nothing in the Norris-LaGuardia Act, or in the record of its enactment by Congress, which furnishes any support for its application to a situation where the Canadian segment of an international union is picketing a British vessel temporarily in a port of the United States in order to bring pressure to bear to assist it in organizing workers in a Canadian province in violation of a law of that particular province which was designed to make such organization unlawful.

A review of the reports on the bill by the Committees of the House and Senate and an examination of the debates indicate clearly that Congress at the time prior to the passage of the Norris-LaGuardia Act, were concerned with *American* Labor Disputes and *American* employers and employees. For example, Congressman Dyer speaking in favor of the bill stated:

> "* * * necessary for Congress to *declare for the United States a policy affecting American Labor.*" (Emphasis Supplied.)
>
> 75 Congressional Record p. 5465.

Congressman Blanton, speaking in opposition to the bill, stated:

> "I believe earnestly in a proper *American* standard of wages, and an *American* standard of working conditions, and an *American* standard of working hours." (Emphasis supplied.)
>
> 75 Congressional Record, p. 5482.

Congressman Fernandez, speaking in favor of the bill, said:

> "For years the *American* working people * * *." (Emphasis supplied.)
>
> 75 Congressional Record, p. 5513.

We submit that Congress, in passing the Norris-LaGuardia Act, did not intend to deprive the District Courts of the right to grant injunctive relief where the principal and only bonafide reason for the picketing in the United States was to aid in the organization of foreign employees who will never perform their work in the United States.

Public policy as declared in the Norris-LaGuardia Act, 29 U. S. C. § 102 (Appendix pp. 45-46, *infra*), indicates that Congress in passing the Act was concerned with the working man in the United States and his freedom to organize and engage in collective bargaining, and in doing away with a "government by injunction," which, prior to the passage of the Act, had infringed upon those rights. We cannot believe that Congress intended that the Norris-LaGuardia Act should have extra-territorial application.

In the majority opinion the Court of Appeals found a "labor dispute" to exist, pursuant to 29 U. S. C. § 113, by first piercing the corporate veil and secondly misapplying or misunderstanding the clear facts with respect to the employment relationship existing at Bowaters Newfound-

land, and third by misconstruing the Act passed by the legislature of Newfoundland (Appendix pp. 48-49, *infra*).

Our contentions with respect to the piercing of the corporate veil is discussed under No. 3, *infra*. The abundant evidence produced at the hearing clearly indicated that the woodsmen working on land of Bowater's Newfoundland, who the Union had organized, were employees of independent contractors. The Newfoundland Labor Relations Board and the District Court both so found from the evidence (R. 20). This relationship is not unusual even in this country in the woods industry as evidenced by our own court decisions and decisions of our National Labor Relations Board.

Haughton v. Columbia River District Council No. 5, International Woodworkers of America, Local Union 5-40 (C. C. A. 9th), 294 F. 2d, 766 (1961);

Dwyer, d.b.a. Clackamas Logging Co., 113 N. L. R. B. 229 (1955);

Harbor Plywood Corp., 119 N. L. R. B. 1429 (1958).

There was no evidence presented at the hearing that a strike was ever called against Bowater's Newfoundland or that any direct employees of that concern participated in the sympathy strike or walkout. The dispute there was clearly with Anglo and supported by employees of some of the independent contractors.

Petitioner contends that the Court of Appeals misconstrued the Act passed by the Newfoundland I egislature which by its terms revoked the Union's certification and prohibited their further attempts to organize in Newfoundland.

It would appear to be settled law that the courts of the United States will not examine the validity of an act

of a foreign state in so far as it purports to be effective within the territory of the foreign state.

American Banana Co. v. United Fruit Co., 213 U. S. 347 (1909);

Underhill v. Hernandez, 168 U. S. 250 (1897).

To the same effect see:

Naamloze Vennootschap Suikerfabriek "Won-Aseh" v. Chase Nat. Bank of City of New York, et al., 111 F. S. 833, 841, (D. C. S. D. N. Y. 1953),

holding, in addition, that while the laws of a foreign country have no extra-territorial force, that things done in one country under authority of law may be of binding effect in another country.

Petitioner submits that the issues of this case raise an important question with respect to the application of the Norris-LaGuardia Act which should be decided by this Court.

2. The Decision of the United States Court of Appeals Misinterprets and Misapplies the Decision of this Court in Marine Cooks & Stewards, Et Al., v. Panama Steamship Co., Ltd., Et Al., 362 U. S. 365 (1960).

It should be made clear at the outset that the vessel involved in these proceedings is not one of the so-called "flags of necessity or convenience" wherein the ultimate ownership is American. The M/V Gladys Bowater is English owned, registered and crewed.

In the *Panama* case this Court found a labor dispute to exist where an allegedly American owned, but foreign registered and crewed vessel was picketed by American seamen protesting "substandard wages or substandard

conditions," (p. 370 of opinion). Justice Black concluded the opinion by stating as follows at p. 372:

> "* * * All we decide is that the Norris-LaGuardia Act deprives the United States court of jurisdiction to issue the injunction it did *under the circumstances shown.*" (Emphasis supplied.)

In the instant case the factual situation differs from that in *Panama*. The situs of the dispute in *Panama* was in the United States, therefore the controversy did concern "terms and conditions of employment" by "persons engaged in the same industry, trade or occupation," as required by the Norris-LaGuardia Act. In the case at hand the situs of the dispute, if any, was admittedly in Newfoundland. The controversy involved another totally unrelated foreign employer (Anglo) and independent contractors. How could the I. W. A. accomplish its objective by picketing a vessel in Buffalo with which it admittedly had no dispute, nor did it have a dispute at the time with a Bowater corporation in Newfoundland. It cannot be said, with any logic, that British seamen and Canadian woodsmen are engaged in similar industries, trade, crafts or occupations. It will also be noted that the reasons given by the Union at the hearing for the picketing of M/V Gladys Bowater (R. 76) are entirely dissimilar from those given in *Panama*.

In the *Panama* case the protest by *American* seamen in picketing the foreign vessel was over loss of jobs. We do not have this question in the instant case. Following the decision in *Panama*, respondent has argued the same reasons, but the record is devoid of any evidence to sustain that Newfoundland paper is laid down in Buffalo at a cheaper rate than paper produced in the United States.

For a Union to picket and stop the operation of a British ship in a United States port while admitting it has

no dispute with the shipowner or the ship's crew, but is only attempting to force recognition and collective bargaining with foreign companies and Canadian woodsmen notwithstanding such action has been prohibited by legislative action, is remote picketing carried to the ultimate extreme.

The remoteness of picketing has been ruled against in the following lower court decisions:

Gomez v. United Office & Professional Workers of America, 73 F. Supp. 679;

Pacific Gamble Robinson Co. v. Minneapolis & St. Louis Ry. Co., 85 F. Supp. 65 (Appeal dismissed 181 F. (2d) 812.

Petitioner submits that the lower courts misinterpreted and misapplied the *Panama* case to these proceedings.

3. The Decision Conflicts with Previous Decisions Rendered by The United States Court of Appeals, Second Circuit, Namely, Khedivial Line, S. A. E. v. Seafarers' International Union, 278 F. (2d) 49 and Empresa Hondurena De Vapores, S. A. v. McLeod, 300 F. (2d) 222 (1962).

On May 4, 1960, the United States Court of Appeals, Second Circuit, rendered its decision in *Khedivial Line S. A. E. v. Seafarers' International Union, supra*, holding that the Norris-LaGuardia Act did not apply to picketing directed at a foreign private employer when the reason for the picketing was the picketer's disagreement with a foreign government policy decision.

At p. 51 of the *per curiam* opinion the court stated:

"* * * the shipowner was not the cause of the picketers' grievance. * * *"

* * * * *

"* * * We do not believe the prohibition of the Norris-LaGuardia Act against the grant of injunctions in 'a labor dispute' extends to picketing directed against policies of the government of the owner of a vessel as distinguished from activities of the owner. Broad as the Act's definition of 'labor dispute' is, it is not broad enough to encompass that."

In the case at hand the legislature of Newfoundland has prohibited recognition of the Union's "locals" in that country and the Newfoundland Labor Relations Board has expressly found that the woodsmen working on land owned or leased by Bowater's Newfoundland were not employees of that Company, but labor contractors. Here, as in *Khedivial,* the shipowner was not the cause of the picketers' grievance.

Petitioner also claims that the Court of Appeals erred in piercing the corporate veil in order to apply the Norris-LaGuardia Act to the facts of this case which is in conflict with their recent decision in the case of *Empresa Hondurena De Vapores, S. A. v. McLeod,* 300 F. (2d) 222 and numerous decisions of this court.

The Appellate Court in its opinion in the instant case states as follows (Appendix pp. 30-31, *infra*):

"* * * Assuming, as we may, that plaintiff and Bowater's Newfoundland had sufficient independence to be regarded in contract or tort litigation, as separate both from the ultimate parent, Bowater Paper Company, Ltd., and from each other, see *Bartle v. Home Owners Cooperative, Inc.,* 309 N. Y. 103, 127 N. E. (2d) 832 (1955), it does not follow that they ought be so regarded for application of the Norris-LaGuardia Act. * * *"

From that point the Court proceeds to find a "labor dispute" involving petitioner, but cites no authority for

its reasoning with respect to the aforementioned quote, nor does the case cited in the above quote support the Court's reasoning.

In the *Empresa* case, *supra*, a matter involving the National Labor Relations Board, the same Court of Appeals had far more reason to pierce the corporate veil, but refused to do so. The Court's cogent reasoning for not piercing the corporate veil is set forth in *Empresa* at p. 225 of that opinion and we submit is in substantial conflict with their decision in this case.

Traditionally courts will pierce the corporate veil only when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime or when the separate entity is used as a "front" or "mere conduit." None of the aforementioned elements are present to the slightest degree in the case at hand. Furthermore, ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between two companies, or render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two. See also:

Schenley Distillers Corporation v. U. S., 326 U. S. 432 (1946);

Peterson v. Chicago Rock Island & Pacific Ry Co. 205 U. S. 364, 391 (1907);

In re Gibraltor Amusements, Ltd. 291 F. (2d) 22 (2 Cir. 1961) Cert. Denied 368 U. S. 925.

4. The Decision of the United States Court of Appeals Violates Article I of the Treaty "To Regulate the Commerce Between the Territories of the United States and of His Britannic Majesty" of 1815 with the United Kingdom, and Interferes with the Foreign Commerce of the United States.

Article I of the treaty referred to above is set forth in the appendix at p. 50, *infra*. It is petitioner's contention that the picketing of the M/V Gladys Bowater by the Union at Buffalo constituted a violation of the provisions of this treaty and the Court of Appeals erred in failing to so find or to consider the matter.

In this regard there is little we can add as argument to the persuasive reasoning of Chief Judge Lumbard set forth at pp. 41 through 43 of the dissenting opinion, Appendix, *infra*.

The case of *Clark v. Pigeon River Improvement Slide & Boom Co.*, 52 F. (2d) 550 (C. C. A. 8th—1931) is most clearly in point with our argument that this treaty was violated by the action of the Union and that an injunction should issue.

That the provisions of the type of treaty in question are "self executing" see the dissenting opinion of Justice Field in the case of *Baldwin v. Franks*, 120 U. S. 679 at pp. 703-704 of the opinion, where specific reference is made to the Treaty under consideration. Although this question was not decisive of the issue then before the Court, Justice Field's convincing analysis of the problem is none the less material here.

5. The Questions Presented Are of Great General Interest to Foreign Shipowners, Exporters, Importers, Stevedores, and Many Other Businesses Involved in Foreign Trade.

Since the decision of this court in *Marine Cooks & Stewards v. Panama S. S. Co.*, *supra*, the respondent has contended that due to lower wages received by woodsmen in Newfoundland a threat is thereby constituted to members of its Union in the United States, and thus a "labor dispute" is created within the meaning of the Norris LaGuardia Act. This argument is made despite the fact that the Newfoundland Labor Relations Board found the individuals involved to be employees of various contractors and not Bowater's Newfoundland and despite the further facts that no competent evidence was produced at the hearing with regard to any such threat to United States union members, nor was their purpose in picketing so stated at the hearing.

If respondent's logic were sound, assuming the Union had proven a competitive advantage, the same argument would apply to the vast majority of goods imported into this country which have been manufactured abroad and shipped in foreign commerce. Needless to say, due to our high standard of living, any union in the United States could picket foreign vessels carrying imported goods using the identical argument and the results on our foreign commerce would soon be disastrous.

We cannot believe that Congress in passing the Norris-LaGuardia Act meant to restrict the jurisdiction of the Federal Courts where the dispute, if any, is entirely within the confines of a foreign country, and where there is no relationship or dispute whatsoever between the party being picketed (foreign vessel owner) and the Union (representing woodsmen).

It is now fairly certain that a foreign vessel owner, with no American contacts, engaged solely in foreign commerce cannot obtain appropriate relief through our National Labor Relations Board. *Empresa Hondurena De-Vapores S. A. v. McLeod*, 300 F. (2d) 222; *West India Fruit and Steamship Co., Inc., v. Seafarers' International Union*, 130 NLRB 46; *Eastern Shipping Corp. v. Seafarers' International Union*, 132 NLRB 72; *in re Hamilton Bros., Inc., et al.*, 133 NLRB 85; *United Fruit Co. v. National Maritime Union*, 134 NLRB 25; *Danzell Towing Co and Compania De Navegacion, S. A. v. National Maritime Union*, 137 N. L. R. B. (1962); nor can adequate relief be given by a state court because their territorial jurisdiction is limited and due to the wide variance in statutes. This latter point is especially true with respect to navigation on the St. Lawrence Seaway and Great Lakes where a foreign vessel may pass through the jurisdiction of eight states during any one transit; or on the Atlantic Seaboard where a foreign vessel may unload portions of her cargo at various ports in different states.

It would therefore seem reasonable that Congress intended a Federal forum for foreign shipowners, at least with those countries with which the United States has treaties of friendship, commerce and navigation, where immediate relief can be obtained for a wrong committed against them while temporarily in a United States port or waters. Chief Judge Lumbard in his dissenting opinion in this case put the matter in the following precise language (Appendix pp. 39-40, *infra*):

> "If my brothers' view is to prevail, it would be well for the Congress to consider now, in light of a shrinking world which could scarcely have been anticipated in 1932, the consequences of applying the Norris-LaGuardia Act to situations which may so seriously affect our foreign relations as the picketing of a

foreign vessel. It surely is arguable that the national interest with respect to strikes and picketing which may affect the United States' relations with foreign countries would be better served by the uniformity attainable by restoring some measure of equity jurisdiction to the federal courts under appropriate Congressional guidance cf. *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 456-457 (1957), than by leaving such sensitive issues to the varying substantive and procedural laws of fifty states, some of which have statutes modeled on the Norris-LaGuardia Act and others of which do not."

In dealing with international commerce generally, and the application of our laws thereto, this court warned in *Lauritzen v. Larsen*, 345 U. S. 571 (1953) at p. 582 as follows:

"* * * in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

(Decided March 28, 1962.)

BEFORE:

LUMBARD, *Chief Judge*,
CLARK AND FRIENDLY, *Circuit Judges*

Appeal from an order of the District Court for the Western District of New York, Harold P. Burke, *Judge*, denying, because of the Norris-LaGuardia Act, 29 U. S. C. §§ 101-115, a motion by plaintiff for a temporary injunction against picketing of its ship. Affirmed.

FRIENDLY, *Circuit Judge*:

The facts, stipulated or testified, include the following: Plaintiff, The Bowater Steamship Company, Ltd., an English corporation, owns the M/V Gladys Bowater, a British registered ship. Plaintiff is owned by Bowater Paper Company, Limited, an English corporation, which also owns The Bowater Corporation of North America, Limited, a Canadian corporation, which, in turn, owns Bowater's Newfoundland Pulp and Paper Mills, Limited, a Canadian corporation. Bowater's Newfoundland operates pulp and paper mills in the Province of Newfoundland, where it has timber lands and licenses to timber rights and lands owned by others. Bowater's Newfoundland sells its paper to a subsidiary, Newfoundland Export and Shipping Company, Limited, which in turn sells some of it to Bowater Paper Company, a New York corporation owned by Bowater Corporation of North America, which sells to consumers in the United States. Paper thus sold is transported by seven British registered vessels, including the

Gladys Bowater, owned by plaintiff and chartered by it to Bowater's Newfoundland.

International Woodworkers of America, hereafter IWA, whose secretary and certain of whose members were named as defendants, is a labor organization with officers and members in the United States and Canada. Beginning late in 1956, IWA sought to organize employees of contractors in Newfoundland who were cutting timber for Bowater's Newfoundland and also employees of Anglo-Newfoundland Development Company, a competing concern with which Bowater's had no corporate affiliation but which had at one time joined with Bowater's in "joint and common labor agreements" covering the woods employees. The Newfoundland Labor Relations Board certified IWA as collective bargaining agent for the employees of Anglo-Newfoundland and of some of the Bowater contractors.

Bargaining by IWA with Anglo-Newfoundland and with the Bowater contractors having failed to produce an agreement, and Anglo-Newfoundland having refused to accept an award by the Newfoundland conciliation service, the IWA called a strike in December, 1958. The strike affected virtually all of Anglo-Newfoundland's lumbering operations. Bowater's announced it would supply Anglo-Newfoundland with pulp wood and did so; this led to a strike by the workers of contractors on Bowater lands. The strike was characterized by violence; a new union was formed, at the urging of the Premier of the Province. Thereupon Anglo-Newfoundland and Bowater issued a joint statement that "Under no circumstances * * * will A. N. D. and Bowater sign any agreement with the I. W. A.," and that if the companies' wood supplies became exhausted through IWA's efforts, they would shut down their mills. On March 6, 1959, the Newfoundland House of Assembly adopted 1959 Trade Union (Emergency Pro-

visions) Act No. 2. This revoked the certification of "each trade union named in the schedule to this Act," to wit, Locals 2-254 and 2-255 of IWA; invalidated any agreements made with any such union; and provided that any such union shall not apply for certification, and that the Labor Relations Board shall not grant certification, without the consent of the Lieutenant-Governor in Council.

In July, 1959, the Gladys Bowater sailed from Newfoundland with a cargo including newsprint destined for two Buffalo papers. The newsprint had been sold to Bowater Paper Company of New York, which resold it to the users. The officers and crew of the Gladys Bowater were British nationals, hired under British articles and represented by British labor organizations. On her arrival in Buffalo on August 3, a picket appeared at the dock with a sign reading "S.S. Gladys Bowater Unfair to Organized Labor, International Woodworkers of America, AFL-CIO." The longshoremen who had been engaged to unload her cargo refused to do so.

Plaintiff then began this action in the Western District of New York, alleging jurisdiction under 28 U. S. C. § 1331, in general terms, and seeking temporary and permanent injunctive relief and damages. A temporary restraining order was issued on August 6, 1959, without a hearing. The picketing ceased; the Gladys was unloaded and sailed on August 8. However, plaintiff pressed the motion for a temporary injunction because of the likely resumption of picketing on further voyages of the Gladys or other Bowater vessels. November 4, 1959, Judge Burke concluded that plaintiff was entitled to a preliminary injunction and directed that a decree be settled on notice; however, none was presented. After the Supreme Court's decision, on April 18, 1960, in *Marine Cooks & Stewards v. Panama SS. Co.*, 362 U. S. 365, the judge called for briefs and further

argument. He concluded, on September 15, 1960, that, under that decision, the Norris-LaGuardia Act, 29 U. S. C. §§ 101-115, deprived him of jurisdiction to grant an injunction. The appeal is from that ruling, 28 U. S. C. § 1292 (a) (1); we affirm.

Since inquiry at the argument revealed that picketing of plaintiff's vessels has not been resumed despite the denial of a temporary injunction more than a year ago, we have considered whether we ought decline to pass upon the thorny issue decided by the District Judge. Plainly defendant's failure to resume picketing does not require us to dismiss plaintiff's appeal as moot; "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case," *United States v. W. T. Grant Co.*, 345 U. S. 629, 632 (1953), and cases cited. Still, as was there said, in order to obtain an injunction, or, we should suppose, to warrant a remand for the issuance of one, "the moving party must satisfy the court that relief is needed"—there must be "some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." 345 U. S. at 633. Here, upon our inquiry at the argument, the defendants, far from disclaiming intention to repeat the allegedly illegal conduct, indicated they might well resume picketing unless our decision should indicate that this would be enjoined. Hence we cannot properly affirm on the simple basis that no need for an injunction now appears.

Section 4 of the Norris-LaGuardia Act, 29 U. S. C. § 104, deprives a Federal court of "jurisdiction" to issue an injunction "in any case involving or growing out of any labor dispute to prohibit any person or persons participating in or interested in such dispute * * * from * * * (e) Giving publicity to the existence of, or the facts involved

in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence." Section 13(c), 29 U. S. C. § 113(c), defines "labor dispute" broadly to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." Section 13(a), 29 U. S. C. § 113(a), says that "A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; * * * or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section)." The latter class is defined in § 13(b), 29 U. S. C. § 113(b), as a person or association against whom relief is sought "if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

Plaintiff first argues that defendants are in the industry or trade of wood-cutting whereas plaintiff is in that of shipping, hence plaintiff and defendants are not "persons who are engaged in the same industry, trade, craft, or occupation." Apart from other possible answers, this argument places more weight on the separate corporate identities of the various Bowater companies than these can properly bear. Assuming, as we may, that plaintiff and Bowater's Newfoundland had sufficient independence to be

regarded, in contract or tort litigation, as separate both from the ultimate parent, Bowater Paper Company, Ltd., and from each other, see *Bartle v. Home Owners Cooperative, Inc.*, 309 N. Y. 103, 127 N. E. 2d 832 (1955), it does not follow that they ought be so regarded for application of the Norris-LaGuardia Act. Whether a subsidiary corporation is to be considered a separate entity "cannot be asked, or answered, *in vacuo*," Latty, The Corporate Entity as a Solvent of Legal Problems, 34 Mich. L. Rev. 597, 603 (1936); the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law. Contrast *Hart Steel Co. v. Railroad Supply Co.*, 244 U. S. 294 (1917), and *Chicago, M. & St. P. Ry. v. Minneapolis Civic & Commerce Assn.*, 247 U. S. 490 (1918), with *In re Gibraltor Amusements, Ltd.*, 291 F. 2d 22 (2 Cir.), cert. denied, 268 U. S. 925 (1961), and *Empresa Hondurena de Vapores, S. A. v. McLeod*, __ F 2d ___, ___ (2 Cir. 1962). As the Supreme Court has repeatedly taught, the policy behind the Norris-LaGuardia Act was a strong one; we cannot think Congress would have meant this to be defeated by the fragmentation of an integrated business into a congeries of corporate entities, however much these might properly be respected for other purposes.[1] Nothing turns on the fact that the picket was not an employee but represented a union seeking to organize employees, *Lauf v. E. G. Skinner & Co.*, 303 U. S. 323 (1938). Neither is there weight in plaintiff's argument that the woods workers in Newfound-

[1] For this reason there is not much force in plaintiff's claim that the sign carried by the picket was false in saying that "S. S. Gladys Bowater" was unfair to organized labor as represented by IWA. Defendants conceded at the argument that the sign could have been better worded and that it might well have been altered if plaintiff had askd that it be. However, since defendants' position was that in substance the whole Bowater enterprise was "unfair," they could well claim that every part of it was.

land are employed by contractors rather than by Bowater's Newfoundland. For, again apart from other possible answers such as Bowater's assistance to Anglo-Newfoundland, there was abundant evidence that Bowater's and Anglo-Newfoundland were directing the policy as to recognition of the IWA, and § 13(c) explicitly tells us that a labor dispute may exist "regardless of whether the disputants stand in the proximate relation of employer and employee." See *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U. S. 91 (1940); *Aetna Freight Lines, Inc. v. Clayton*, 228 F. 2d 384, 386-387 (2 Cir. 1955), cert. denied, 351 U. S. 950 (1956).

The applicability of the Norris-LaGuardia Act would thus have been patent if the timber lands had been, say, in Minnesota and a vessel owned by an affiliate of their owner had brought the paper down the lakes to Buffalo from the west rather than the east. The problem here arises from the foreign aspects of the case. These are always important, and may be critical; we have recently recognized that where such aspects exist, statutory words often are not "stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage," *Empresa Hondurena de Vapores, S. A. v. McLeod, supra, at* ___. However, in that same opinion, at ___, we pointed out the distinction between the application to a largely foreign setting of an affirmative regulatory statute, there the National Labor Relations Act, and, referring to *Marine Cooks*, the withholding by the Norris-LaGuardia Act of a particular remedy in a particular set of courts against conduct occurring in our own country. See The Supreme Court, 1959 Term, 74 *Harv. L. Rev.* 95, 193-194 (1960).

We read *Marine Cooks* as settling a number of points in this area. One is that inapplicability of the picketing

provisions of the Labor Management Relations Act of 1947 to a labor dispute because of the latter's foreign contracts, *Benz v. Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), does not carry similar inapplicability of the Norris-LaGuardia Act in its train, 362 U. S. at 369. Another is that the foreign registry of a vessel, there the S. S. Nikolos, does not give a district court "jurisdiction" to enjoin picketing which the court would not have if the ship flew our own flag, 362 U. S. at 372. A third is that the Norris-LaGuardia Act applies even when, as there, the American seamen who were picketing were not intervening in a dispute between the crew of the vessel and its owner, as in the *Benz* case, but rather were seeking to discourage labor practices of the owner, to wit, allegedly substandard wages and working conditions under Liberian registry, which the seamen deemed inimical to themselves and their fellow-workers on American-flag ships, 362 U. S. at 371 and fn. 12.

With the picketed vessel here treated as owned by the owner of the timber lands and rights, as, for reasons previously explained, she must be for Norris-LaGuardia purposes, and postponing the effect of the Newfoundland statute for further consideration, the only significant difference between *Marine Cooks* and the instant case is that there American seamen were picketing in an endeavor to force a foreign owner of a vessel in American waters to take steps, presumably higher wages and better working conditions, that would decrease the competitive advantage of foreign-flag over American-flag ships, whereas here American (and perhaps Canadian) woods workers were picketing in an endeavor to force a foreign owner of a vessel in American waters to recognize their union to represent Newfoundland woods workers on its land and, presumably, thereafter to grant higher wages to the latter that would

decrease the disparity between the $2.00-$2.10 per hour, found to be the base rate of woods workers who were IWA members in Washington or Oregon, and the $1.10 per hour Newfoundland base rate. At first sight, the latter point seems not a difference from *Marine Cooks* but a similarity with it. However, the situations do differ in that the allegedly low-paid seamen on the S. S. Nikolos had been carrying freight between Mexico and the United States and were themselves in American waters, whereas here the allegedly low-paid workers, although producing material for the American market, remain in Newfoundland. Although this latter factor may make the instant case less appropriate than *Marine Cooks* for the application of the Norris-LaGuardia Act, on the basis that Congress is not so likely to have been concerned to prevent Federal court injunctions relating to labor disputes where the laborers were never in the United States, another factor, not present in *Marine Cooks*, works somewhat the other way—the American union, picketing in the United States, is the very union that is seeking to organize the employees in Newfoundland. The novel question thus posed is whether, with two of the interests that are contending in the foreign country also contending in the United States, we should decline to give the words of the Norris-LaGuardia Act the application which their letter requires, because, in contrast to *Marine Cooks*, the employees whose wages and working conditions are sought to be affected are never here.

We do not find this an adequate basis for distinction. The Norris-LaGuardia Act was framed in terms of a withdrawal of jurisdiction, and the Supreme Court has told us in *Marine Cooks* that "The fact that a foreign ship enters a United States court as a plaintiff cannot enlarge the jurisdiction of that court," 362 U. S. at 372. Under that

and other decisions stressing the breadth of the Norris-LaGuardia Act, of which it is enough to cite *United States v. Hutcheson*, 312 U. S. 219, 230-236 (1941), and *Order of Railroad Telegraphers v. Chicago & N. W. Ry. Co.*, 362 U. S. 330, 335-336 (1960), we cannot think "jurisdiction" is generated by the further fact of permanent absence of the employees from the United States, when the employer (or his Norris-LaGuardia equivalent) and an American union, seeking to organize the foreign employees in an effort to reduce the adverse competitive effect on American workers from lower wages or harder working conditions abroad, are both here. Beyond that we do not need to, and do not, go.

Plaintiff argues finally that even if the Norris-LaGuardia Act would otherwise apply, it does not here because of the 1959 Trade Union (Emergency Provisions) Act No. 2 of Newfoundland. Plaintiff says, citing *Khedivial Line, S. A. E. v. Seafarers' International Union*, 278 F. 2d 49, 51 (2 Cir. 1960), that, because of the Newfoundland statute, defendants' "dispute" is no longer with Bowater's, who now could not lawfully recognize the IWA even if it would, but with the Government of Newfoundland. We are not required to decide whether such a contention would be valid if the Newfoundland statute banned all union activity in that Province, or even if it banned the IWA for all time; in such a case we would have to consider whether the *Khedivial* decision, relating to action by a foreign government in the international political arena, there anti-Israel policies of the United Arab Republic, should be extended to governmental action in the foreign country's own labor scene. Here, even putting aside evidence suggesting that the Newfoundland statute stemmed from the problems which Bowater's and Anglo-Newfoundland were having with the IWA and that the legislature might therefore

not be unresponsive to a changed attitude on their part, cf. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127, 137 (1961), we do not read the statute as forever banning the IWA; the Act rather implies that, on a showing of changed conditions, such as a collective bargaining agreement, the Lieutenant-Governor in Council might consent to renewed certification. Thus it cannot fairly be said that an effort by IWA to press Bowater's toward that end is solely a dispute with the Government rather than with the employer—at least until Bowater's has tried to achieve governmental approval and has failed. Cf. *United States v. General Electric Co.*, 115 F. Supp. 835, 878 (D. N. J. 1953). Also the record contains evidence that, at the time of the hearing, the IWA still had dues-paying members in Newfoundland and was continuing picketing there; this is scarcely consistent with the view that, with the passage of the Act, the dispute became solely one between the IWA and the Newfoundland Government.

Since the Norris-LaGuardia Act deprived the District Court of jurisdiction to issue the requested injunction, we find it unnecessary to pass on other points in support of the judgment made by appellee. These are that the complaint did not sufficiently set forth a claim within 28 U. S. C. § 1331 or any other heading of district court jurisdiction under c. 85 of Title 28; that, despite *Benz v. Compania Naviera Hidalgo, S. A., supra*, the controversy was within the jurisdiction of the National Labor Relations Board under 29 U. S. C. § 158(b)(4); and, in the alternative, that if New York law applies, the picketing was still not unlawful. These issues would require resolution if plaintiff should press its claim for damages, but we need not deal with them now, see *Marine Cooks*, 362 U. S. at 368 fn. 5, 371 and 372.

Affirmed.

LUMBARD, *Chief Judge* (dissenting):

As I do not believe that the Norris-LaGuardia Act forbids a federal court from issuing an injunction such as the plaintiff here seeks, and as it seems to me that there is sufficient basis for federal jurisdiction and ample reason for granting a preliminary injunction, I dissent and vote to reverse the order of the district court and direct the issuance of a preliminary injunction.

On March 6, 1959, in the wake of violence and bloodshed, the Legislature of Newfoundland enacted the 1959 Trade Union (Emergency Provisions) Act No. 2.[1] Section 3 of the Act revoked the certification of IWA's Newfoundland locals, and Section 4 specifically voided agreements entered into between the IWA unions and any employer. The IWA argues that the Act does not prevent voluntary recognition of IWA locals by Bowater's Newfoundland, but only precluded certification by the Newfoundland Labour Relations Board. However, the events which prompted the

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[1] The 1959 Trade Union (Emergency Provisions) Act No. 2 reads, in part, as follows:

"3.—(1) Notwithstanding anything contained in the said Act or in any other statute or law, any certification as bargaining agent (hereinafter referred to as 'certification') granted under the said Act to each trade union named in the schedule to this Act is revoked.

"(2) Where certification granted under the said Act to a trade union is revoked by this Act, the union shall not without the consent of the Lieutenant-Governor in Council apply for certification under the said Act and the Labour Relations Board shall not without the like consent grant certification under the said Act.

"4. Where certification granted under the said Act to a trade union is revoked by this Act, an agreement entered into and in force on the date of the passing of this Act between the union and an employer is void as from that date and no longer binds the parties to the agreement.

SCHEDULE

INTERNATIONAL WOOD WORKERS OF AMERICA LOCAL 2-254
INTERNATIONAL WOOD WORKERS OF AMERICA Local 2-255"

Act's passage make it manifest that the legislature's intent was to outlaw the union as a means of putting a stop to the violent and bloody struggle between the IWA and the employers of the woods workers.[2]

There is nothing in the Norris-LaGuardia Act, and in the record of its enactment by the Congress, which furnishes any support for its application to a situation where a union is picketing a foreign vessel in order to bring pressure to bear to assist it in organizing workers in a foreign country in violation of foreign law designed to make such organizing unlawful. In *Khedivial Line, SAE v. Seafarers' International Union*, 278 F. 2d 49 (2 Cir. 1960), this Court held that the Norris-LaGuardia Act did not apply to picketing directed at a foreign private employer when the reason for the picketing was the picketers' disagreement with a foreign government's policy decision. In that case we said that "the shipowner was not the cause of the picketers' grievance. * * * [W]hatever had been done here was the United Arab Republic's doing, not plaintiff's * * * We do not believe that the prohibition of the Norris-LaGuardia Act against the grant of injunctions in a 'labor dispute' extends to picketing directed against policies of the government of the owner of a vessel as distinguished from activities of the owner." I believe that this doctrine is equally applicable here. The legislature of Newfoundland has prohibited recognition of IWA locals; and the IWA is picketing plaintiff in retaliation because of its corporate association with another Bowater company on whose land some of the unorganized workers are lumbering.

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[2] In fact the Newfoundland Labour Relations Board found that the woods workers were employed by independent contractors who contracted with Bowater's Newfoundland to have the lumbering done on the latter's land.

While plaintiff's right to a final decision after trial is not absolutely certain, it can hardly be doubted that it raised questions of a serious and substantial nature and that balancing the hardships involved there would seem to be far less potential harm to the defendants if the injunction is granted than the harm which would accrue to the Bowater companies[3] if a preliminary injunction were denied. *Hamilton Watch Co. v. Benrus Watch Co., Inc.*, 206 F. 2d 738, 740 (2 Cir. 1953). This case is unlike the typical labor injunction case, where the entering of a preliminary injunction which may be dissolved once the facts are more fully disclosed can often break the strike. For there the picketers are striking against their own employer, and if prevented from applying immediate economic pressure, have little chance of success; while here the picketing is designed to apply a more general pressure against an outside employer, and the picketers continue their employment even during the picketing. Therefore, it would not seriously hamper the union activities if it were restrained from picketing plaintiff until a full dress trial could be held and a final determination made; to allow picketing during this interim would cause irreparable harm to the Bowater companies through breach of contracts and possible rupture of business relations with the attendant loss of good will in the market where a very substantial proportion of their paper is sold.

If my brother's view is to prevail, it would be well for the Congress to consider now, in light of a shrinking world which could scarcely have been anticipated in 1932, the

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[3] Since Judge Friendly decided that for purposes of the Norris-LaGuardia Act we should consider the plaintiff, Bowater Steamship Co., and the logging company, Bowater's Newfoundland, as a single enterprise, it would be only equitable to take regard of the damage to both in deciding whether to issue an injunction.

consequences of applying the Norris-LaGuardia Act to situations which may so seriously affect our foreign relations as the picketing of a foreign vessel. It surely is arguable that the national interest with respect to strikes and picketing which may affect the United States' relations with foreign countries would be better served by the uniformity attainable by restoring some measure of equity jurisdiction to the federal courts under appropriate Congressional guidance, cf. *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 456-457 (1957), than by leaving such sensitive issues to the varying substantive and procedural laws of fifty states, some of which have statutes modeled on the Norris-LaGuardia Act and others of which do not.[4]

Nor are the courts ousted of jurisdiction of this case by the National Labor Relations Act. In *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 245 (1959), the Supreme Court stated that "When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board," even if the Board declines to assert jurisdiction. However, since the National Labor Relations Act does not apply to a dispute with as many foreign contacts as the present one, *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U. S. 138 (1957); *Marine Cooks & Stewards AFL v.*

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[4] See Hamilton's statement, The Federalist, No. 80, that the Federal courts were given jurisdiction over maritime causes since "These so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace," and also the recent remark of our brother Clark "And in the international field, certainly we cannot execute the world leadership now thrust upon us, or even safeguard our own future, if we remain a divided nation of merely separate states." Federal Procedural Reform and States' Rights; to a More Perfect Union, 40 Tex. L. Rev. 211 (1961).

Panama Steamship Co., Ltd., 362 U. S. 365, 369 (1960); *Empresa Hondurena de Vapores, S.A. v. McLeod*, F. 2d (2 Cir. 1962), the Board does not have primary jurisdiction and a state or federal court can hear the case. *Benz v. Compania Naviera Hidalgo, S.A., supra*. Therefore, the district court could hear this case if some ground of federal jurisdiction exists.

The plaintiff advances a claim under the treaty "To Regulate The Commerce Between The Territories of The United States And of His Britanick Majesty," signed and ratified in 1815, 8 Stat. 228, and extended indefinitely on August 6, 1827, 8 Stat. 361. This is sufficient to give the district court jurisdiction under 28 U. S. C. §§ 1331 and 1350.

Article 1 of the treaty provides that "inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers * * * to which other foreigners are permitted to come * * * and, generally, * * * the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively." Under the Supremacy Clause of the United States Constitution, Article VI, § 2, treaties, along with federal statutes, are the supreme law of the land. See *Maiorano v. Baltimore & O. RR.*, 213 U. S. 268, 272-73 (1909); *Foster v. Neilson*, 2 Pet. 253, 314 (1829); *United States v. The Schooner Peggy*, 1 Cranch 103 (1801); *Ware v. Hylton*, 3 Dall. 199 (1796); Briggs, The Law of Nations 886 (1952). Thus when the wording of a treaty is sufficiently explicit to permit its application without additional implementing statutes, as is this treaty, and it is reasonably probable that the parties to the treaty intended it to be self-executing, as here, the treaty is enforced without further legislation. See *United States v.*

Peck eman, 7 Pet. 51, 87-89 (1833); *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P. 2d 617, 619-20 (Cal. 1952); *Bacardi Corp. of Amer. v. Domeneah*, 311 U. S. 150, 161 (1940); *Hausenstein v. Lynham*, 100 U. S. 483 (1879); 5 Hackworth, Digest of International Law 177-185 (1943).

The treaty explicitly confers rights not only upon the two signatory countries, but also upon "the inhabitants of the two countries." See *Jones v. Meehan*, 175 U. S. 1 (1899); *Chew Heong v. United States*, 112 U. S. 536 (1884); 87 C. J. S. Treaties § 25. Although less clear, these rights secured to plaintiff are enforceable not only against the United States government but also against individuals. The United States can fulfill its treaty obligation of protecting the guaranteed freedoms in two ways: first, by not acting contrary to the treaty and, second, by making its courts available to prevent individuals from acting contrary to the treaty. The combination of the Supremacy Clause of the Constitution, a self-executing treaty, and the jurisdiction afforded by 28 U. S. C. §§ 1331 and 1350 imply this second step. In *Clark v. Pidgeon River Improvement Slide & Boom Co.*, 52 F. 2d. 550 (8 Cir. 1931), a treaty with Canada was used as the basis for an injunction against an American company that was interfering with a Canadian company's right of free passage. See also *Maiorano v. Baltimore & O. RR.*, *supra*, at 273.

It is, therefore, necessary to ascertain what substantive rights the treaty confers on the plaintiff. Since it provides that inhabitants of the two countries shall have liberty freely to come to all ports "to which other foreigners are permitted to come," the substantive rights accorded plaintiff rise no higher than those accorded other foreigners with whose countries we have no treaty. Moreover, it would be illogical to conclude that the treaty was meant to accord plaintiff more freedom than our own citizens have. Therefore, the treaty must be interpreted as meaning that

the specified foreigners will be protected from interference with their rights to use American ports when that interference constitutes a tort under either federal or state law for which any foreigner or American citizen would be similarly protected. Such a construction gives full scope to the phrase "subject always to the laws and statutes of the two countries." Thus Article 1 of the treaty does not create any new substantive rights for an individual vis-a-vis another individual, but affords a federal forum for the protection of existing substantive rights. It is altogether understandable that, shortly after the close of our second armed conflict with Great Britain within the space of forty years, Congress should seek to provide a federal forum to decide issues relating to the freedom of British subjects freely and securely to use our ports. Since such disputes might well rise to the level of international incidents it befits a national tribunal to hear such cases at the trial level. Conferring such a protective jurisdiction is within the competence of the treatymakers. See *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U. S. 582 (1949) (opinion of Jackson, J.); *Schumacker v. Beeler*, 293 U. S. 367 (1934); Hart & Wechsler, The Federal Courts and the Federal System 372 (1953), upholding federal court jurisdiction to enforce certain state created rights.

The final question, then, is whether the IWA's action is tortious under federal or state law. For reasons stated above, the National Labor Relations Act does not apply to this case; the field is thus left open to state law. *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U. S. 138 (1957).

New York has recognized the prima facie tort doctrine, holding tortious the infliction of intentional harm, without excuse or jurisdiction. *Opera on Tour, Inc. v. Weber*, 285 N. Y. 348, 34 N. E. 2d 349 (1941); *American Guild of Musical Artists, Inc. v. Petrillo*, 286 N. Y. 226, 36 N. E. 2d 123 (1941); *Advance Music Corp. v. American*

Tobacco Co., 296 N. Y. 79, 70 N. E. 2d 401 (1946); *Ruza v. Ruza*, 286 App. Div. 767, 146 N. Y. S. 2d 808 (1955); *Brandt v. Winchell*, 283 App. Div. 338, 127 N. Y. S. 2d 865 (1954); *Original Ballet Russe, Ltd. v. Ballet Theater, Inc.*, 133 F. 2d 187 (2 Cir. 1943). When no lawful labor objective is present, the New York courts have applied this doctrine to labor union activities in general, *Opera on Tour, Inc. v. Weber*, 285 N. Y. 348, 355, 34 N. E. 2d 349, 352 (1941); *American Guild of Musical Artists, Inc. v. Petrillo*, 286 N. Y. 226, 231, 36 N. E. 2d 123, 125-26 (1941) and to picketing in particular, *Goodwins, Inc. v. Hagedon*, 303 N. Y. 300, 305, 101 N. E. 2d 697, 699 (1951); *Edward J. Burke Investigation and Auto Recovery Bureau v. Downey*, 197 N. Y. S. 2d 89 (1960). At the full trial of this case the district court might well find that the IWA was picketing the plaintiff in order to induce Bowater's Newfoundland to recognize the IWA or its locals and contract with them. Since this would violate the 1959 Trade Union (Emergency Provision) Act No. 2, it would not be a "lawful labor objective" as that term is used by the New York courts. Nor does New York's version of the Norris-LaGuardia Act, New York Civil Practice Act § 876-a, apply to prohibit injunctive relief when no "lawful labor objective" is involved. *American Guild of Musical Artists v. Petrillo*, 286 N. Y. 226, 231, 36 N. E. 2d 123, 125-26 (1941); *Goodwins, Inc. v. Hagedon*, 303 N. Y. 300, 305, 101 N. E. 2d 697, 699 (1951); *Opera on Tour, Inc. v. Weber*, 285 N. Y. 384, 34 N. E. 2d 349 (1941).

It was an abuse of the discretion of the district court to refuse to grant a preliminary injunction against the picketing of the defendants which was tortious under the law of the State of New York.

For these reasons, I would reverse the district court's denial of a preliminary injunction.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

(Entered March 28, 1962.)

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed; with costs to the appellees.

STATUTES AND TREATIES INVOLVED.

Norris-LaGuardia Act.

29 U. S. C. A. § 101.

"§ 101. *Issuance of restraining orders and injunctions; limitation; public policy.*

"No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter. Mar. 23, 1932, c. 90, § 1, 47 Stat. 70."

29 U. S. C. A. § 102.

"§ 102. *Public policy in labor matters declared.*

"In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the

United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70."

29 U. S. C. A. § 113.

"§ 113. *Definitions of terms and words used in chapter.*

"When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the

same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia. Mar. 23, 1932, c. 90, § 13, 47 Stat. 73."

NEWFOUNDLAND

AN ACT TO MAKE PROVISION FOR SAFEGUARDING THE PUBLIC INTEREST IN VIEW OF THE PRESENT UNSETTLED CONDITIONS IN THE WOODS LABOUR PART OF THE PULP AND PAPER INDUSTRY IN THE PROVINCE.

(March 6, 1959)

WHEREAS strikes have been called in the woods labour part of the pulp and paper industry of the province;

AND WHEREAS since those strikes were called many loggers have been convicted of offenses against the Criminal Code arising out of the strikes and have been fined or sent to prison;

AND WHEREAS because of the lawlessness existing in connection with the strikes many loggers who are willing and anxious to resume employment in the forests with the companies engaged in the pulp and paper industry in the province are reluctant to do so;

AND WHEREAS because of these things a state of grave emergency exists in the pulp and paper industry of the province and the economy of the province is in jeopardy;

AND WHEREAS in these circumstances it is necessary to take extraordinary steps in an endeavour to bring an end to the emergency;

Be it therefore enacted by the Lieutenant-Governor and House of Assembly in Legislative Session convened, as follows:

Short title.

1. This Act may be cited as The Trade Union (Emergency Provisions) Act, 1959.

Interpretation.

2. In this Act "trade union" means a trade union within the meaning of The Labour Relations Act, chapter 258 of The Revised Statutes of Newfoundland, 1952 (hereinafter referred to as the "said Act.").

Revocation of certification.

3.—(1) Notwithstanding anything contained in the said Act or in any other statute or law, any certification as bargaining agent (hereinafter referred to as "certification") granted under the said Act to each trade union named in the schedule to this Act is revoked.

Consent required for new application for certification.

(2) Where certification granted under the said Act to a trade union is revoked by this Act, the union shall not without the consent of the Lieutenant-Governor in Council apply for certification under the said Act and the Labour Relations Board shall not without the like consent grant certification under the said Act.

Agreement void where certification revoked.

4. Where certification granted under the said Act to a trade union is revoked by this Act, an agreement entered into and in force on the date of the passing of this Act between the union and an employer is void as from that date and no longer binds the parties to the agreement.

SCHEDULE

Schedule.

INTERNATIONAL WOOD WORKERS OF AMERICA
Local 2-254

INTERNATIONAL WOOD WORKERS OF AMERICA
Local 2-255

Article I of the Treaty dated 1815 between the United States and the United Kingdom entitled "To Regulate the Commerce Between the Territories of the United States and of His Britannic Majesty," 8 U. S. Stat. 228.

"Article I.

"There shall be between the territories of the United States of America, and all the territories of His Britannic Majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."